A. G. Mazzocchi, Inc. and Maztec Environmental, Inc., as alter egos and a Single Employer d/b/a Mazzocchi Wrecking *and* Local 560, International Brotherhood of Teamsters AFL–CIO. Case 22–CA–24212

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On June 5, 2001, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief, and the Charging Party filed a brief supporting the judge's decision.

The National Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has considered the decision and the record[1] in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, and orders that the Respondents, A. G. Mazzocchi, Inc. and Maztec Environmental, Inc., as alter egos and a single employer, d/b/a Mazzocchi Wrecking, East Hanover, New Jersey, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(b).

"(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

Dated, Washington, D.C. August 27, 2001

Peter J. Hurtgen,	Chairman
Wilma B. Liebman,	Member
John C. Truesdale,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Jeffrey P. Gardner, Esq., for the General Counsel.
Arthur G. Warden, Esq., for the Respondent.
Paul A. Montalbano, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City on February 27 and March 1, 2001. On a charge filed on September 27, 2000,[1] a complaint was issued on December 28, alleging that A. G. Mazzocchi, Inc. (AGM) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The complaint was subsequently amended to add as additional Respondents Maztec Environmental, Inc. (Maztec) and Mazzocchi Wrecking (together with AGM as Respondents). Respondents filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on April 19, 2001.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

[1] All dates refer to 2000 unless otherwise specified.

[1] In adopting the judge's findings that the Respondent's failure to assign work to the discriminatees violated Sec. 8(a)(3) and (1) of the Act, we note that the statements of Joe Herzog, an undisputed statutory supervisor, are attributable to the Respondent. Thus, the General Counsel's burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is satisfied by the evidence establishing that Herzog told the discriminatees that they were not being assigned work because of their union activity.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Chairman Hurtgen notes that there are no exceptions to the judge's finding that Respondents Mazzocchi and Maztec are single employers and/or alter egos. Therefore, particularly as to the alter ego finding, he adopts only on a proforma basis. In this regard, he notes that there is no finding of an intent to avoid statutory obligations. See *AAA Fire Sprinkler, Inc.*, 322 NLRB 69 fn. 8 (1996).

[3] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (2001).

FINDINGS OF FACT

I. JURISDICTION

Respondents, with offices in East Hanover, New Jersey, have been engaged in the business of demolition and solid waste removal services. Respondents admit, and I find, that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Local 560, IBT, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Respondents

AGM was incorporated in 1967, with 51 percent of the stock owned by Anthony Mazzocchi and 49 percent owned by his son, Nicholas. In 1988, Nicholas assumed control of the Company and as of February 2000 he was president and his sister, Grace, was vice president. In 1990, a second company, Maztec, was formed, operating out of the same facility. Grace is president of Maztec, owning 51 percent of the stock, and Nicholas is vice president, owning 49 percent. As of November 20, 2000, AGM and Maztec began doing business as Mazzocchi Wrecking.

Director of Operations Edward King, Jr. testified that he had authority over all of the drivers, including the AGM drivers and the Maztec drivers. He also testified that the truck reports combine the drivers for both companies and the "Who's Where Daily," which lists the manpower and location of each job, includes the drivers of both AGM and Maztec. Jan Zajac testified that trucks contained the names of both AGM and Maztec and that the drivers of both companies interchanged, driving the trucks of both AGM and Maztec.

2. The alleged unfair labor practices

(a) Jan Zajac

Jan Zajac began his employment with AGM as a truckdriver on February 9. He worked 5 days a week. In May he contacted Jim Huxford, the Union's business agent, and distributed union authorization cards. He attended several union meetings and was the union observer at the election, which was held on June 22.

Zajac testified than on July 31 he received a telephone call from his supervisor, Joe Herzog, who told him that he would not be assigned work the next day. When Zajac asked Herzog how come he wouldn't be working, Zajac testified that Herzog replied, "You know how come." Zajac testified that for the next month, each day Herzog told him that he wouldn't be working. Zajac testified that in early September, during one of the telephone calls, he asked Herzog, "How come I'm not working? . . . I understand you people hire a new guy, and he worked and I never worked." Zajac testified that Herzog replied, "Because you bring the Union . . . I don't think you'll be working again."

(b) Chauncey Singletary

Chauncey Singletary began working for AGM as a truckdriver on February 2. He signed a union authorization card and attended union meetings during June. He testified that prior to June 20 he worked 5 days a week. On that day, which was 2 days before the election, he received a phone call from Herzog, at which time Herzog told him that there was no work the following day. Singletary testified that when he asked Herzog why he was not being assigned work, Herzog replied, "They're messing with you because they think you had something to do with bringing in the Union." Singletary testified that after that time he was only assigned work 1 or 2 days a week. He also testified that another driver, Joshua Moke, was hired around July 1.

(c) Robert Griles

Robert Griles began his employment with AGM as a truckdriver in May 1998. In terms of seniority he was 5th or 6th out of approximately 15 drivers. He distributed union authorization cards and attended the union meetings during May and June. He testified that prior to August he received work assignments every day. He further testified that in the beginning of August he received a phone call from Herzog who told him that he wouldn't be working. When Griles asked why, Herzog replied, "Aw, they just messin' with you." Griles testified that Herzog told him, "The Union, that they felt that I had something to do with it and . . . it would get straightened out once the contracts were signed." Griles testified that he was out of work for approximately 2 months, that Moke was hired after the election, and that since the contract was signed he has been assigned work everyday. The contract was signed in November.

Discussion and Conclusions

1. Alter ego and single employer

The complaint, as amended, alleges that for the period beginning May 1 to the present AGM and Maztec were alter egos, or alternatively, a single employer. Respondents concede that since November 20 the two companies have been doing business as Mazzocchi Wrecking.

In *Crawford Door Sales*, 226 NLRB 1144 (1976), the Board stated the following criteria for establishing alter ego status:

> Clearly each case must turn on its own facts, but generally we have found alter ego status where the two enterprises have "substantially identical" management, business purpose, operation, equipment, customers, and supervision, as well as ownership.

Not all of these indicia need be present. *Blake Construction Corp.*, 245 NLRB 630, 634 (1979), enf. granted in part and denied in part on other grounds 663 F.2d 272 (D.C. Cir. 1981); *Walton Mirror Works*, 313 NLRB 1279, 1283–1284 (1994). The Board has held that common ownership is established if both companies are owned by members of the same family. *J.M. Tanaka Construction Inc.*, 249 NLRB 238, 241 fn. 29 (1980), enfd. 675 F. 2d 1029 (9th Cir. 1982); *Walton Mirror Works*, supra, at 1284.

Nicholas Mazzocchi is president of AGM, owning 49 percent of the Company's stock, and his sister, Grace, is vice-

president. Their father, Anthony, owns 51 percent of the company's stock. Grace is president of Maztec, owning 51 percent and Nicholas is vice president, owning 49 percent. Prior to December 2000. Herzog supervised the employees of both AGM and Maztec. Since that time King has been the Director of Operations and has authority over all of the employees. The business of the two companies is the same and AGM and Maztec operate out of the same facility. Drivers are interchanged for the two companies and the trucks are interchanged. Truck reports combine the drivers for both companies and the "Who's Where Daily" includes the drivers of both AGM and Maztec. Based on the above, I find that Maztec is the alter ego of AGM.

As mentioned above, the complaint, as amended, also alleges that AGM and Maztec constitute a single employer, within the meaning of the Act. The criteria that the Board normally looks to in deciding whether nominally separate businesses may be regarded as a single employer are common management, common ownership, centralized control of labor relations, and interrelation of operations. See *Merchants Iron & Steel Corp.*, 321 NLRB 360 fn. 1 (1996). For the same reasons stated above for finding that Maztec is the alter ego of AGM, I find that the two corporations constitute a single employer, within the meaning of the Act.

2. Work assignments

Zajac, Singletary, and Griles appeared to me to be credible witnesses. I credit their testimony that prior to the summer of 2000 they had all been working full time. Zajac and Griles distributed union authorization cards, and Zajac was the union observer at the election and all three attended union meetings. I credit Zajac's testimony that Herzog told him "because you bring the Union . . . I don't think you'll be working again." Similarly, I credit Singeltary's testimony that Herzog told him "they're messing with you because they think you had something to do with the Union." Likewise, I credit Griles' testimony that Herzog told him "they felt that I had something to do" with the Union and that "it would get straightened out once the contracts were signed." I find that General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Respondents' decision to stop assigning work to the three employees.

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), once a prima facie showing has been made, the burden shifts to the employer to demonstrate that the "same action would have taken place even in the absence of the protected conduct." Respondents argue that during the summer of 2000 there was no practice of seniority at the facility. I believe that Respondents have not sustained their burden. King testified that drivers' work assignments changed starting in June because Zajac and Singletary were the "two newest guys." This clearly implies that assignments were based on seniority. In addition, when listing the criteria for making assignments King listed seniority as one of the criteria.

Moke was hired by Respondents as a truckdriver in July. I credit Griles' testimony that in terms of seniority he was 5th or 6th out of approximately 15 drivers. I find that Respondents have not sustained their burden, and that beginning in the summer of 2000, Respondents failed to assign work to Zajac, Singletary, and Griles, while assigning work to other employees, including some less-senior employees. These constituted unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

3. Other allegations

The complaint alleges that beginning in the summer of 2000 Respondents assigned nonprevailing wage jobs to Zajac, Singletary, and Griles, while assigning prevailing wage jobs to other employees. These allegations were not mentioned in General Counsel's opening statement, were not substantiated at the hearing and are not referred to in General Counsel's brief. Accordingly, the allegations are dismissed. Similarly, the complaint alleges that Respondents violated Section 8(a)(5) of the Act. Again, this allegation was not mentioned in General Counsel's opening statement, was not dealt with at the hearing and is not referred to in General Counsel's brief. Accordingly, the allegation is dismissed.

The complaint, as amended, alleges that beginning November, AGM and Maztec have been doing business as Mazzocchi Wrecking. Respondents' brief states that "On May 16, 2000, Maztec filed a certificate of registration to use the alternate name of Mazzocchi Wrecking. As of November 20, 2000, Maztec and AGM were doing business as Mazzocchi Wrecking". Accordingly, I find that as of November 20 AGM and Maztec were doing business under the name Mazzocchi Wrecking.

The amended complaint also alleges that beginning November Mazzocchi Wrecking is the successor to AGM and Maztec. While General Counsel contends that AGM and Maztec merged into Mazzocchi Wrecking, the record does not substantiate that a merger or any other acquisition took place. The record only contains a Certificate of Registration of Alternate Name dated April 21, allowing Maztec to use the assumed name of Mazzocchi Wrecking. Accordingly, I find that General Counsel has not sustained its burden of showing that Mazzocchi Wrecking is a successor employer. As stated earlier, however, I do find that commencing November 2000 the two companies have been doing business as Mazzocchi Wrecking.

CONCLUSIONS OF LAW

1. Respondents, AGM and Maztec, constitute a single employer and Maztec is the alter ego of AGM.

2. Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. By failing to assign work to Zajac, Singletary and Grimes because of their protected activities, Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondents did not violate the Act in any other manner alleged in the complaint.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall order Respondents to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondents, having unlawfully failed to assign work to Zajac, Singletary, and Griles, I shall order Respondents to make those individuals whole for any loss of earnings and benefits they may have suffered by reason of Respondents' failure to assign them work. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondents, A. G. Mazzocchi, Inc. and Maztec Environmental, Inc., as alter egos and as a single employer, and d/b/a Mazzocchi Wrecking, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to assign work to employees for activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order make whole Jan Zajac, Chauncey Singletary, and Robert Griles for any loss of earnings and other benefits that they may have suffered by reason of the discrimination against them, with interest, in the manner set forth in the Remedy section.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facilities copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since June 20, 2000.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

(e) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 5, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to assign work to employees for activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, make whole Jan Zajac, Chauncey Singletary, and Robert Griles for any loss of earnings and benefits they may have suffered by reason of the discrimination against them, with interest.

A. G. MAZZOCCHI, INC., MAZTEC ENVIRONMENTAL, INC., MAZZOCCHI WRECKING

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."